No. 1926

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE CORVALLIS AND EASTERN RAILROAD COMPANY (a Corporation),

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Upon Writ of Error to the United States Circuit Court for the District of Oregon.

WM. D. FENTON,
J. K. WEATHERFORD,
BEN C. DEY, and
JAMES E. FENTON,
Attorneys for Plaintiff in Error.

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Brief of Plaintiff in Error.

STATEMENT OF THE CASE.

This is an action brought by the United States, the defendant in error, against the Corvallis and Eastern Railroad Company, plaintiff in error, to recover damages alleged to have been suffered and sustained by reason of the negligence of the plaintiff in error. For convenience, the plaintiff in error will be hereafter designated under the name of Railroad Company, and the defendant in error under the name of United States.

It is charged in the complaint that the Railroad

Company was negligent in two particulars: *First.* It is alleged that the Railroad Company, on and prior to the 23rd day of July, 1906, carelessly and negligently failed and neglected to remove from its right of way where the same traverses and passes through the timber land in the State of Oregon belonging to and adjacent to lands belonging to the United States commonly known as the Cascade Forest Reserve, debris and inflammable material consisting of dead and dry trees, logs, grass, old ties and other dead and dry vegetable matter, and carelessly and negligently failed and neglected to keep its said right of way in said places clear of such trees, logs, grass and old ties and dead and dry vegetable matter, and carelessly and negligently permitted and allowed large quantities of dead and dry trees, logs, grass, old ties and other dead and dry vegetable matter to accumulate along the right of way of said Railroad Company's railroad where the same traversed and passed through said tracts of timber land, and that by reason of such negligence a fire communicated from one of the Railroad Company's engines into the said inflammable and combustible material on the said right of way, and from there spread into the said Forest Reserve and burned and destroyed the timber of the United States on and within the same. *Second.* It is alleged that the Railroad Company was negligent and careless in equipping its engines or in equipping the engine which it used upon its road along and

through the said Forest Reserve; and it is alleged that the Railroad Company carelessly and negligently permitted and allowed its engine to be out of repair, and negligently and carelessly failed and neglected to equip said engine with spark arresters and apparatus to prevent the escape of sparks, cinders, coal, and fire, and carelessly and negligently placed said engine in charge of and in control of unskilled employees and servants, and that by reason of said carelessness and negligence of said Railroad Company in failing and neglecting to remove from its track and right of way, and to keep the same free and clear of dead and dry trees, logs, grass, old ties, and other dead and dry vegetable matter, and by reason of the accumulation thereof upon its track and right of way, and the careless and negligent management and operation of its said engine, and in carelessly and negligently permitting said engine to be out of repair, and carelessly and negligently failing to equip said engine with apparatus to prevent the escape of fire, sparks and cinders, it scattered large quantities of sparks, fire and burning cinders upon and along said railroad track and right of way of the said railroad, and started a fire upon said right of way, which fire spread from said right of way to and upon the tracts of timber land owned by and belonging to the United States, and burned and destroyed 200,000 feet, board measure, of merchantable timber belonging to the United States, of the reasonable value of $100.00, and that because of the said

fire, the United States was put to a great expense in fighting the same and keeping said fire from spreading and destroying other valuable timber belonging to the United States, in the amounts as follows, to-wit: extra labor, $619.25; transportation and travel, $7.30; supplies and tools, $95.99,— and that thereby the United States suffered damages in the total sum of $822.54.

There are two causes of action alleged in the complaint. Both are based upon the same charges of negligence, but refer to fires occurring at different times. The first cause of action is based upon a fire alleged to have occurred about the 23rd day of July, 1906. The second cause of action is based upon a fire alleged to have occurred on the 11th day of August, 1906; in the second cause of action the United States claims damages in the sum of $9,880.90, which includes the value of the timber alleged to have been destroyed, and the cost and expense incurred by the United States in extinguishing said fire and preventing its spread.

The Railroad Company, by its answer, denies the negligence charged in the complaint, and for a further and separate answer and defense to the first cause of action set out in the complaint, alleges:

That on the 23rd day of July, 1906, and for a long time prior thereto, the Railroad Company was using only one engine on the railroad of said company along the line of its road mentioned and referred to in the complaint, which said engine made one

trip daily from Albany to Detroit and return, arriving at Detroit about the hour of 12 o'clock M., and leaving Detroit about 1 o'clock P. M.; that said engine was in charge of a careful, capable, skillful and prudent engineer together with a careful, capable and skillful fireman who were operating and did operate said engine on said day and at all times before and after, in a careful, skillful and prudent manner; that at said time and for a long time prior to said time said engine was furnished with the most approved spark arresters known and in practical use, provided with wire screens, and the same were in perfect order and so managed that no sparks could or did pass through the screens or spark arresters, and that said engine was supplied with coal-boxes or ash-pans of the most approved pattern and the one in general use on railroad engines used for like purposes, and that said coal-box or ash-pan was in perfect condition, and that the fire mentioned in the complaint could not, and did not, originate from the sparks emitting from the said engine, or from the coal-box or ash-pan, or from coals being dropped by said engine through the coal-box or ash-pan attached thereto.

And the Railroad Company, for a second and further answer to the first cause of action set out in the complaint, alleges that the fire mentioned and described in the complaint as having occurred on the 23rd day of July, 1906, did not start or originate on the right of way of the Railroad Company, but started upon lands outside of and away

from its said right of way, and upon lands that did not belong to the Railroad Company, and it is alleged that said fire originated in and near a cabin a short distance from the right of way of the Railroad Company, which said cabin was frequently used by persons hunting and fishing, for camping purposes, and that the same had been so used immediately before the fire mentioned in the first cause of action set out in the complaint.

The Railroad Company, for a further and separate answer to the second cause of action set out in the amended complaint, sets up the same facts as in the first further and separate answer to the first cause of action set out in the amended complaint, and for a second further and separate answer to the second cause of action set out in the amended complaint, the Railroad Company alleges that where said fire started on or about the 11th day of August, 1906, a smoldering fire had been burning in some old logs some distance from the right of way, and had been emitting smoke therefrom for several days prior to the said 11th day of August, 1906, and that said fire originated from said smoldering fire in said dead logs that had been ignited on the 23rd day of July, 1906, which said fire had not been extinguished; that said fire of August 11, 1906, did not originate upon the right of way of the Railroad Company, or near the same, or from any sparks emitted from its said engine or from any coals dropped through its ash-pan, or

from any other cause connected with its said engine or train.

The United States, replying to the affirmative matter set up by the Railroad Company in its answer, denies each and every allegation thereof.

Upon the issues thus made, the trial of this case was begun before the court and jury on the 21st of March, 1910, and continued from day to day until the 29th day of March, 1910, when the jury in said cause returned a verdict in favor of the United States and against the Railroad Company for the sum of $4,422.38, and on the same day a judgment was rendered upon said verdict, in favor of the the United States and against the Railroad Company, for the said sum of $4,422.38, together with costs and disbursements, taxed at $724.21.

On October 3, 1910, and within the time allowed by law and the orders of the Court, the Railroad Company duly filed its motion for a new trial, which was overruled on November 9, 1910.

On the 9th day of November, 1910, and within the time allowed by law and the orders of the trial court, the Railroad Company tendered its Bill of Exceptions, and the same was then settled and allowed and made a part of the record in this cause.

On the 18th day of November, 1910, the Railroad Company duly served and filed its petition for a writ of error, and therewith its Assignment of Errors, and on the same date a writ of error in said cause was duly issued. The Railroad Company, upon its writ of error, relies upon the following

assignment of errors, which, for convenience and to prevent confusion, will be numbered the same as in the Transcript of Record.

ASSIGNMENT OF ERRORS.

XVI.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff to offer, and in admitting in evidence, over the objection and exception of defendant that the same was incompetent and immaterial and a self-serving declaration, Exhibits 4 and 5, as follows, to-wit:

EXHIBIT 4.

"Portland, Oregon, Apr. 24, 1906.

"Mr. John A. Shaw,
Sec'y Corvallis & Eastern R. R.
Albany, Oregon.

Dear Sir:

Your right of way through the Cascade Forest Reserve in T. 10 S. R., 5 E. is reported by Ranger Harry G. Hayes as being in a very dangerous condition as regards brush, debris, rotting logs and ties, and is a menace to valuable timber owned by the Government on account of the liability of a spark from an engine starting a fire in this inflammable material which might result in great damage to other property by the spreading of forest fires thus started, in the dry season.

I enclose a copy of his report made after making a personal examination, and also a few kodak prints taken by him to verify his statements.

In view of this dangerous condition of your right of way, I will ask you to take measures as soon as possible to clean up this right of way, and until this is accomplished, during the dry season to maintain a fire patrol after each train.

While such action on your part cannot be compelled under the present State or Federal laws, yet it would seem advisable for you to attend to this matter, both on account of the general good that would be accomplished by removing the danger to all property within a considerable distance of your line, and also for your own protection, as it is the opinion of the Assistant United States Attorney that damages could be collected for property destroyed through your neglect in leaving this inflammable material on your right of way, and thus producing a menace to nearby property.

I enclose copy of the opinion of the Assistant United States Attorney in this matter.

If this right of way is not cleaned up by you in a thorough manner, and if a fire is started on account of neglect in not burning this debris, etc., resulting in damage to Government timber, the Government will at once take measures to recover full damages, on the grounds that the damage was caused by negligence on your part in allowing your right of way to be covered with inflammable material, which was a menace to the property of others.

Very truly yours,

(Signed) D. D. Bronson, Forest Inspector."

3 enclosures.

EXHIBIT 5.

"April 26, 1906.

"Mr. Daniel D. Bronson,
Forest Inspector,
Customs House, City.

Dear Sir:

Yours of the 24th inst. to hand relative to the condition of the right of way of the Corvallis & Eastern R. R. in Township 10 South, Range 5 East. I have sent the correspondence to Mr. J. K. Weatherford, Vice President of the company, who will take the matter up with our Superintendent. I will advise you as soon as possible in regard to what they will do relative to cleaning up the right of way.

Yours truly,

John A. Shaw."

(Transcript of record, pp. 380-382.)

XIX.

Said Circuit Court erred upon the trial of said cause in permitting the witness Jacob Merle to testify over the objection and exception of defendant that the same was incompetent and immaterial, and in refusing to strike out said testimony for the reason that the same was incompetent and immaterial, which testimony is as follows:

"Q. Will you please state the condition you found that engine in after the July 23rd fire, pursuant to the report made to you?

A. After the engine was reported, I examined the netting and stack; I told them it was pretty hot yet to examine—

Q. Never mind what you told them. Tell the jury what you found.

A. I got up and examined the engine with a torch. It was so hot you could not get in there, and the engine had to be used the next morning, and with a torch I could not see anything in the stack, because it was too hot to get your head down in there. I waited until about eight o'clock, trying to find the master mechanic, to report to him what had happened; and they asked me if I could see anything. I told them no, and they allowed the engine to go out the next day."

Whereupon said witness further testified as follows:

"They had to work at it the following day, and concluded to hold the engine and take the stack off the engine, and the barrel of the stack of this engine stands up maybe two feet on the inside, cannot tell how many inches, could figure it out on a blue print map; it had no hole out in the bottom of the barrel of the stack to allow cinders to go into the smoke-box; the base of the stack to the top of the barrel was full of cinders, and they were hot; he got down on the floor and took all these cinders out; searched the netting and could not find anything wrong with the netting; held the smokestack there all that day until late in the evening, waiting for the master mechanic to come and look at it himself, to see if he could see anything wrong with it; he didn't come, and about 7 o'clock that night he had the stack on, and told them, and let the engine go out; it went out a few days, and he had to look at it again—complaint made of the engine again; they concluded to take stack off and put

another one on, and they did so, and shortly after this other engine that had this stack, it was reported, and he got up on this engine and looked at the stack, and found between the casting of the trap-door, where the man that had put the netting in didn't have material enough to reach over to the flange, consequently he could take his rule by opening it two inches single thickness—two foot rule—and put it between the casting and the netting; he went to work and got some pieces of netting—the engine had to be used—and put in three different pieces, he thinks; they have six courses in that or more—the same stack went on the second engine; on that engine at that time he put them in and flanged them out, and that stack was all right after that; consequently he concluded there was trouble with the stack; he had taken that stack down before that and put two holes—had the machinist drill two big holes in the barrel of the stack; first thought that was the cause, and after the holes were cut in, and made the same as the other stacks, there were still complaints made, and after that he located the trouble under that trap-door between the lower casting of the trap-door—the base, and the netting, and he fixed it; was up at Breitenbush Springs after the second fire, talking about it, one thing and another; it was after the second fire that he located that stack, but there was another stack reported on another engine afterwards, on two or three engines that run up there; engine 2 was reported, it had been running up there; engine 1 was reported again, and found in bad condition."

(Transcript of record, pp. 384-386.)

XX.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff to interrogate, and the witness Jacob Merle to testify, over the objection and exception of the defendant that the same was incompetent and not pleaded, as follows:

"Q. Now, on these examinations, what condition did you find the ash-pan of this engine in? That is, the apparatus underneath to—

A. Mr. Walsh had come and asked me to look over the ash-pans at that time, and we found the ash-pan netting—after looking at the stack and everything, he insisted on looking at all the ash-pans; they looked at engine one's ash-pan and the netting did not come up to the mud rim by two inches—the piece of netting; the ash-pan is maybe eight to ten inches deep, and the netting came—it is bolted on with three bolts on the bottom of the ash-pan, two bolts on the side; there was a space of two inches; he looked through the wheel himself; he insisted on my putting a piece of netting across; we did not bolt it on but sewed it on with wire, and it remained in that way that season."

(Transcript of record, p. 387.)

XXI.

Said Circuit Court erred upon the trial of said cause in admitting in evidence the testimony of the witness Jacob Merle, over the objection and exception of defendant that the same was incompetent and not pleaded, and in refusing to strike out the same as incompetent and not pleaded, as follows:

"There was nothing between this mud ring and the piece of netting when the damper was open;

when it was shut, the damper was close; there was an aperture for the escape of sparks and coals—you could put your arm through it—the full length of the ash-pan, full width of it; in one corner of that pan the ashes had accumulated all around, they were kind of hot, and it bucked it up; he corked in asbestos, and kind of fixed it down."

(Transcript of record, pp. 387-388.)

XXII.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff to interrogate the witness Jacob Merle, and said witness to testify, over the objection and exception of the defendant that the same was incompetent and not within the issues, as follows:

"Q. Now, then, were you an experienced man in the examination and repair of stacks and apparatus?

A. I would like to rectify that statement. I had that door fixed, I didn't do it myself, I had it fixed, I put it up."

(Transcript of record, p. 388.)

XXIV.

Said Circuit Court erred upon the trial of said cause in permitting counsel for plaintiff to ask the witness Jacob Merle, and said witness to testify, over the objection and exception of the defendant that the same was conjectural, speculative and incompetent, as follows:

"Q. Now, that—how was it that that stack was allowed to get in that condition, then?

A. Having no man detailed to examine the

engines on their arrival on every trip, consequently they were never examined until the engineer reported them.

Q. Reported them how?

A. Reported that there was something wrong with the engines—with the stack."

(Transcript of record, p. 389.)

XXV.

Said Circuit Court erred upon the trial of said cause in refusing to strike out the testimony of said witness Jacob Merle, hereinafter set out, as tending to show negligence not charged in the complaint, and as incompetent, as follows:

"A. Having no man detailed to examine the engines on their arrival on every trip, consequently they were never examined until the engineer reported them.

Q. Reported them how?

A. Reported that there was something wrong with the engine—with the stack."

(Transcript of record, p. 389.)

XXXV.

Said Circuit Court erred upon the trial of said cause in refusing to instruct the jury as duly requested by the defendant, as follows:

"The fact, if you so find, that these engines at either of these times or at other times, may have allowed sparks to escape, and that such sparks may have been alive or sufficient to burn the skin of a person who might be riding on the train immediately behind such engine, would not of itself be any evidenec that the defendant was negligent, or that

these spark-arresters or other appliances were defective or out of repair, or that the engine with these appliances was negligently operated. The defendant did not insure that sparks might not escape from its engine in a good state of repair with reasonably safe appliances and operated by reasonably careful and prudent persons in a reasonably careful and prudent manner, and it is only when such sparks are scattered in unusual quantities or of unusual size, that any inference of negligence in that particular can arise or be found by the jury."

(Transcript of record, p. 395.)

XXXVI.

Said Circuit Court erred upon the trial of said cause in refusing to instruct the jury as duly requested by the defendant, as follows:

"I instruct you that under the law and the evidence in this case, the United States, by its officers and agents, had authority to sell this burned timber, either with or without any other timber that might be left standing. If you find from the evidence that if the United States, by its officers and agents in charge, by the exercise of reasonable diligence, could have sold the burned timber and realized therefrom so as to reduce the damage which may have been caused by the fire, then the plaintiff in this case would not be entitled to charge the defendant for any damages which could have been thereby avoided, even though you find that the defendant negligently caused the damages or some portion of the damages claimed on account of either of the fires respectively. By this I mean that if the timber which was burned over could by reason-

able diligence have been sold for as much as the plaintiff claims such timber was worth at the time, and if such sales could have been made within a period of two or three years, and thereby the damages reduced or wholly avoided, then to the extent that the plaintiff could have reduced such damages by such sale, even though it was the full value of such timber, the plaintiff would not now be entitled to charge the defendant therewith."

(Transcript of record, pp. 395-396.)

XXXVII.

Said Circuit Court erred upon the trial of said cause in refusing to instruct the jury as duly requested by the defendant as follows:

"There had been some evidence introduced in this case tending to show what was the market value of this timber at the time it was burned. The market value of this timber is the price which it would bring when it was offered for sale by one who desires to but who is not obliged to sell it, and is bought by one who is under no necessity of having it; and if you find from the evidence that the United States by its forestry officers or other persons having charge of its business, attempted to sell or offered for sale this burned timber at a price beyond its market value, as I have defined it, then the fact that there was no sale under such circumstances would be no evidence that the plaintiff had used reasonable diligence in attempting to make such sale or in attempting to avoid the loss caused by such fire or fires."

(Transcript of record, pp. 396-397.)

XXXVIII.

Said Circuit Court erred upon the trial of said cause in refusing to instruct the jury as duly requested by the defendant, as follows:

"In determining the market value of stumpage of this timber at the time and place of either of these fires, you should take into consideration the location of the timber, its accessibility to transportation facilities, the character of the timber as to quality and quantity on the lands affected, the facilities or difficulty of logging the same and delivering the timber to market, the availability of such timber for use; the extent and accessibility of the markets, the convenience or inconvenience to the logging streams, or other means of transportation, its remoteness or nearness to mills or other customers that might have use therefor, and all the facts surrounding the incident, and determine as best you can from the evidence whether or not such timber had a market value per thousand feet, and if so, what it was, under all the circumstances, and, determining the market value, apply the rule that it is what property offered for sale by one who desires to sell but it not obligated to sell, would bring, being bought by some one who is under no necessity of buying it, and who is willing to pay the price, for any useful purpose."

(Transcript of record, pp. 397-398.)

XXXIX.

Said Circuit Court erred upon the trial of said cause in refusing to instruct the jury as duly requested by the defendant, as follows:

"Any changes or precaution adopted by the de-

fendant since these fires, if any, cannot be considered by you. A party has the right to adopt changes or take precautions after a fire that may be deemed more effective, and these changes or precautions cannot be considered as any admission or evidence that they were necessary or should have been adopted or in use before or at the time of the fires."

(Transcript of record, p. 398.)

XL.

Said Circuit Court erred upon the trial of said cause in refusing to instruct the jury as duly requested by the defendant, as follows:

"The plaintiff alleges in its complaint, and has introduced some evidence to the effect that the defendant's right of way was not kept clean and free of combustible material liable, by sparks or coals discharged by its engines, to communicate the fire to the property of others. On that subject I instruct you that the burden of proof rests upon the plaintiff to show that the fire started on the right of way, for unless that fact be established, the alleged negligence of the railroad company in suffering the combustible material to get on its right of way was not the efficient and proximate cause of the accident, and upon that allegation of negligence the plaintiff would fail."

(Transcript of record, p. 398.)

XLII.

Said Circuit Court erred upon the trial of said cause in instructing the jury as follows:

"Now in this, as in all cases, it is the duty of a

party to reduce his damages as much as can reasonably be done under the circumstances, and therefore, if you believe from the testimony that after this timber had been burned, it could have been disposed of by the Government officials for any sum—according to what sum it could have been disposed of, if it had an opportunity to sell it—it was, I think, its duty to have done so and thus reduced the damages, but in determining that question, and in examining that view of the question, you will not overlook the fact as to whether there is a market for the sale of this timber; whether they had an opportunity to sell it; whether they could have disposed of it, and all the circumstances that surrounded the location and condition of this particular timber now in controversy. If these people could have sold this timber—if there was a market for it and they could have sold it and gotten something for it,—it was their duty to do so and reduce the damages. If, on the other hand, they could not sell it, they were not negligent in failing to do so, and the Government would be entitled to recover whatever damages it sustained by reason of the fire."

To which instruction the defendant then and there duly excepted.

Said Circuit Court erred particularly in instructing the jury as follows:

"And in examining that view of the question, you will not overlook the fact as to whether there is a market for the sale of this timber."

To which the defendant then and there duly and particularly excepted.

Said Circuit Court erred particularly in giving that portion of said instruction, as follows:

"If there was a market for it and they could have sold it and gotten something for it—it was their duty to do so and reduce the damages. If, on the other hand, they could not sell it, there was no market for it, and no opportunity to sell it, they were not negligent in failing to do so, and the Government would be entitled to recover whatever damages it sustained by reason of the fire."

(Transcript of record, pp. 399-400.)

The foregoing assignment of errors may be summarized as follows: *First:* The court erred in admitting in evidence over objection of the Railroad Company, the letter written by D. D. Bronson, Forest Inspector, to John A. Shaw, Secretary of the Railroad Company, and the letter of Shaw in reply thereto. (Assignment of Errors XVI, Transcript of Record, pp. 380-381.) *Second:* The court erred in admitting, over the objection of the Railroad Company, evidence of repairs made and precautions taken by the Railroad Company after the alleged injury was sustained; and erred in refusing to instruct the jury at the request of the company that they could not consider such evidence. (Assignment of Errors XIX, XX, XXI, XXII, XXIV, XXV, and XXXIX, Transcript of Record, pp. 384-389 and 398.) *Third:* The court erred in refusing to instruct the jury at the request of the company that it is only when the emission of sparks unusual in quantity or of an extraordinary size is shown, that a jury would be justified in inferring negli-

gence; and that even in that case the burden of proof is not shifted to the company. (Assignment of Errors XXV, Transcript of Record, p. 395.) *Fourth:* The court erred in refusing to instruct the jury as requested by the company to the effect that it was the duty of the United States to minimize the damages, if any, sustained by it by reason of the alleged negligence of the Company; and erred in charging the jury as it did on this subject. (Assignment of Errors XXXVI, XXXVII and XLII, Transcript of Record, pp. 395, 397 and 399.) *Fifth:* The court erred in refusing to instruct the jury as requested by the company on the subject of the measure of damages. (Assignment of Errors XXXVII, XXXVIII Transcript of Record, pp. 396-397.) *Sixth:* The court erred in refusing to instruct the jury as requested by the company that the proofs must conform to the negligence alleged. (Assignment of Errors XL, Transcript of Record, page 398.)

Upon these assignments of error the company submits the following Points and Authorities:

POINTS AND AUTHORITIES.

I.

That a statement made by a party or his agent in a letter written by said party or agent, after he had reason to believe a controversy is impending, where the correctness of such statement is in issue, is self-serving and inadmissible.

Woolsey et al. v. *Haynes*, 165 Fed. 391;
Hightower v. *Ansley*, 126 Ga. 12;
Telford v. *Howell*, 220 Ill. 52;
T. D. Kellogg L. & Mfg. Co. v. *Webster Mfg. Co.*, 140 Wis. 346.

II.

That evidence of repairs made or precautions taken after an injury is received, is not competent to prove antecedent negligence causing such injury.

Sappenfield v. *Main St. R. R. Co.*, 91 Cal. 61;
Columbia R. R. Co. v. *Hawthorne*, 144 U. S. 207;
Davidson S. S. Co. v. *United States*, 142 Fed. 319;
Lake v. *Shenango Furnace Co.*, 160 Fed. 893.

III.

That it is only when the emission of sparks unusual in quantity or of an extraordinary size is shown, such as would not be emitted from a well constructed locomotive, that a jury would be justified in inferring negligence in that particular. Even in that case, the burden of proof is not shifted to the Railroad Company, but such fact would cast upon the Company the duty of explanation only.

Elliott on Railroads, Sec. 1242;
Peck v. *N. Y. C. & H. R. R. Co.*, 165 N. Y. 350, 351;

Chenoweth v. *Southern Pacific Co.*, 53 Or. 114, 115;

St. Louis Southwestern R. Co. v. *Moss*, 84 S. W. 281;

Cincinnati Ry. Co. v. *South Fork Co.*, 139 Fed. 537;

Toledo etc. R. Co. v. *Star Flouring Mills*, 146 Fed. 956, 960.

IV.

That it is the duty of a party whose property is injured, to minimize the damages if any which he has sustained by reason of the negligence of another.

V.

That where trees are destroyed by the negligence of another, the owner may bring an action either for the value of the trees so destroyed, or for the injury to the land. If the owner bring the former action, the proper measure of damages is the market value of the trees destroyed, independent of the land. If he bring the latter action, the measure of damages is the diminished market value of the land resulting from such destruction of the trees thereon. Where trees are injured by fire by the negligence of another, but not destroyed, the owner may bring an action for the injury to the trees or for the injury to the land, in either case the measure of damages is the difference between the market value

of such trees or land immediately before and immediately after the fire.

Central Railroad Co. v. *Murray*, 93 Ga. 256;
Gordon v. *Railroad Co.*, 103 Mich. 379;
Atkinson v. *A. & P. R. R. Co.*, 63 Mo. 367;
Union Pac. R. R. Co. v. *Murphy*, 76 Neb. 547;
Hart v. *Chicago & N. W. R. Co.*, 83 Neb. 654;
Bailey v. *Chicago, M. & St. P. Ry. Co.*, 3 S. D. 531;
Miller v. *Neale*, 137 Wis. 426.

VI.

That where several acts of negligence are alleged proof of one will support a recovery; but the proofs must conform to the negligence alleged.

ARGUMENT.

I.

A STATEMENT MADE BY A PARTY OR HIS AGENT IN A LETTER WRITTEN BY SUCH PARTY OR AGENT, AFTER HE HAS REASON TO BELIEVE A CONTROVERSY IS IMPENDING, WHERE THE CORRECTNESS OF SUCH STATEMENT IS IN ISSUE, IS SELF-SERVING AND INADMISSIBLE.

This point covers the question raised by the admission in evidence, over the objection of the rail-

road company, of the letters set forth in Assignment of Errors XVI, Transcript of Record, pp. 380-382.

In the letter from D. D. Bronson, Forest Inspector, to John A. Shaw, Secretary of the Company, dated April 26, 1906, the writer says:

> "Your right of way through the Cascade Forest Reserve in T. 10 S., R. 5 E. is *reported* by Ranger Harry G. Hayes as being in a very dangerous condition as regards brush, debris, rotting logs and ties, and is a menace to valuable timber owned by the Government on account of the liability of a spark from an engine starting a fire in this inflammable material which might result in great damage to other property by the spreading of forest fires thus started, in the dry season," * * *
>
> "If this right of way is not cleaned up by you in a thorough manner, and if a fire is started on account of neglect in not burning this debris, etc. resulting in damage to Government timber, the Government will at once take measures to recover full damages, on the grounds that the damage was caused by negligence on your part in allowing your right of way to be covered with inflammable material, which was a menace to the property of others."

One of the allegations in the amended complaint is,

> "That the said defendant company operated its said line of railroad in a negligent and careless manner in that said defendant company, on and prior to the 11th day of August, 1906,

carelessly and negligently failed and neglected to remove from its right of way where the same traverses and passes through the timber land in the State of Oregon belonging to and adjacent to lands belonging to the plaintiff, commonly known as the Cascade Forest Reserve, as aforesaid, debris and inflammable material consisting of dead and dry trees, logs, grass, old ties and other dead and dry vegetable matter, and carelessly and negligently failed and neglected to keep its said right of way in said places clear of such trees, logs, grass and old ties and dead and dry vegetable matter, and carelessly and negligently permitted and allowed large quantities of dead and dry trees, logs, grass, old ties and other dead and dry vegetable matter to accumulate along the right of way of said defendant's railroad where the same traversed and passed through said tracts of timber land aforesaid, well knowing that by reason of its said carelessness and negligence, great danger existed that a fire or fires might be started from sparks or cinders from any of its engines being run over said road, or from burning matches or cigar stubs that might be thrown from any of the trains running over said road in passing through said tracts of land, although the said defendant was notified and requested, on or about April 24, 1906, to remove said debris and inflammable material from said right of way and to prevent the accumulation of the same thereon by plaintiff's forest inspector located in Portland, Oregon."

(Transcript of record, p. 6.)

This allegation in the amended complaint is contained in each cause of action and is in almost the exact language contained in this letter.

These allegations in the amended complaint were denied by the company in its answer; and the question as to whether or not the company permitted brush, debris, rotting logs and ties and inflammable material to accumulate upon and along the right of way of the railroad company at the place stated, was one of the issues that was tried in this case.

That Bronson, the Forest Inspector, who wrote this letter, had reason to believe that a controversy was impending in which the correctness of his statement contained in this letter would be in issue, is manifest from the fact that in this letter the writer says that,

> "If this right of way is not cleaned up by you in a thorough manner, and if a fire is started on account of neglect in not burning this debris, etc., resulting in damage to Government timber, the Government will at once take measures to recover full damages, on the grounds that the damage was caused by negligence on your part in allowing your right of way to be covered with inflammable material, which was a menace to the property of others."
>
> (Transcript of record, pp. 381-382.)

The language in this letter, to the effect that the right of way of the railroad company was covered with brush, debris, rotting logs and ties, and was a menace to valuable timber owned by the Government on account of the liability of a spark from an

engine setting a fire in this inflammable material, is a self-serving declaration and was inadmissible. The error of the court in admitting this letter was emphasized by the fact that this witness testified to the same matters contained in this letter.

This witness testified on this subject as follows:

> "He gave a notice, April, 1906, to the defendant as to the condition of this right of way, through the Forest Reserve. It was a letter addressed to John A. Shaw—one of the officers—Secretary of defendant—and he kept a regular office copy."
>
> (Transcript of record, p. 155.)

This letter is also incompetent because it is hearsay. The writer says,

> "Your right of way through the Cascade Forest Reserve in T. 10 S., R. 5 E. is *reported* by Ranger Harry G. Hayes as being in a very dangerous condition as regards brush, debris, rotting logs and ties, and is a menace to valuable timber owned by the Government, etc."
>
> (Transcript of record, p. 380.)

Harry G. Hayes was a witness for the Government and testified that,

> "On July 23rd, and prior to that, the right of way near the track, was that all of the natural conditions afforded a great deal of brush, briers, fern, logs, timber, fir and such things, and the logging conditions afforded logs, rollways you might call them; the railroad company afforded rotten ties; in fact there was

almost all kinds of vegetation; there were places this vegetation and this matter were very dry, shortly prior to the first and second fires."

(Transcript of record, pp. 128-129.)

The admission of this letter in evidence had the same effect before the jury as if they had heard the oral testimony of the witness and then read the same after being transcribed. The rule is well settled that the deposition of a witness cannot be used where he has testified, unless it is used to contradict his testimony. It may have been competent for the railroad company to offer this letter against the United States but when offered in behalf of the United States it was a self-serving declaration and was wholly incompetent.

II.

EVIDENCE OF REPAIRS MADE OR PRECAUTIONS TAKEN AFTER AN INJURY IS RECEIVED, IS NOT COMPETENT TO PROVE ANTECEDENT NEGLIGENCE CAUSING SUCH INJURY.

The case of *Columbia & Puget Sound Railroad Company* v. *Hawthorne*, 144 U. S. 202, was an action brought against a corporation to recover damages for negligence in providing an unsafe and defective machine, whereby the plaintiff in said action was injured, and in that case the court said, (pages 206-7):

"This writ of error, therefore, directly pre-

sents for the decision of this court the question whether, in an action for injuries caused by a machine alleged to be negligently constructed, a subsequent alteration or repair of the machine by the defendant is competent evidence of negligence in its original construction.

"Upon this question there has been some difference of opinion in the courts of the several states. But it is now settled, upon much consideration, by the decisions of the highest courts of most of the states in which the question has arisen, that the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant."

This point covers Assignment of Errors XIX, XX, XXI, XXII, XXIV, XXV and XXXIX.

The court permitted witnesses for the Government, over the objection of the railroad company, to testify as to the condition of the company's engine after the fire of July 23, 1906, and also as to repairs made on said engine, as is shown in Assignment of Errors XIX, XX, XXI, XXII, XXIV and XXV. The court also refused to instruct the jury that any changes or precautions adopted by the railroad company since the fire could not be considered by them, and that a party had the right to adopt changes or take precautions after a fire that may

be deemed more effective, and that these changes or precautions could not be considered by the jury as any admission or evidence that they were necessary or should have been adopted or in use before or at the time of the fires. See Assignment of Errors XXXIX, Transcript of Record, p. 398.

The admission of this evidence by the court and the refusal to give this instruction was manifest error.

III.

IT IS ONLY WHEN THE EMISSION OF SPARKS UNUSUAL IN QUANTITY OR OF AN EXTRAORDINARY SIZE IS SHOWN THAT A JURY WOULD BE JUSTIFIED IN INFERRING NEGLIGENCE. EVEN IN THAT CASE THE BURDEN OF PROOF IS NOT SHIFTED TO THE RAILROAD COMPANY, BUT SUCH FACT WOULD CAST UPON THE COMPANY THE DUTY OF EXPLANATION ONLY.

This point covers the question raised in Assignment of Errors XXXV, Transcript of Record, p. 395, wherein the court refused to instruct the jury as requested by the railroad company, as follows:

> "The fact, if you so find, that these engines at either of these times or at other times, may have allowed sparks to escape, and that such sparks may have been alive or sufficient to burn the skin of a person who might be riding on the train immediately behind such engine, would not of itself be any evidence that the defendant was negligent, or that these spark-arresters or

other appliances were defective or out of repair, or that the engine with these appliances was negligently operated. The defendant did not insure that sparks might not escape from its engine in a good state of repair with reasonably safe appliances and operated by reasonably careful and prudent persons in a reasonably careful and prudent manner, and it is only when such sparks are scattered in unusual quantities or of unusual size, that any inference of negligence in that particular can arise or be found by the jury."

The case of *Chenoweth* v. *Southern Pacific Company*, 53 Oregon, 111, was an action for the loss of hay by fire alleged to have been caused by the emission of sparks from engines of defendant, resulting from improper construction and careless and negligent management and operation of said engine. In that case the court in passing upon that question said, (page 119):

"Evidence that the engine, just prior or subsequent to the fire, scattered sparks is not sufficient to import negligence. It is only when emitting them in unusual quantities or of unusual size that it has that effect."

We submit, therefore, that the court erred in refusing to give this instruction.

IV.

IT IS THE DUTY OF A PARTY WHOSE PROPERTY IS INJURED TO MINIMIZE THE DAMAGES, IF ANY, WHICH HE HAS SUSTAINED BY REASON OF THE NEGLIGENCE OF ANOTHER.

This principle of law is too well settled to require the citation of any authorities.

The foregoing proposition of law applies to the question involved in Assignment of Errors XXXVI, XXXVII and XLII.

The railroad company requested the trial court to give the instructions set forth in Assignment of Errors XXXVI and XXXVII upon the question of the duty of the United States to reduce the damages, if any, it had suffered by reason of the alleged negligence. Instead of giving these instructions as requested by the railroad company, the court gave the instruction set forth in Assignment of Errors XLII.

Our contention is that the instruction as given by the court was too narrow in its application and was too favorable to the Government,—especially the latter portion of this instruction, which is as follows:

> "If these people could have sold this timber—if there was a market for it and they could have sold it and gotten something for it—it was their duty to do so and reduce the damages. If, on the other hand, they could not sell it, they were not negligent in failing to do so, and the Government would be entitled to recover

whatever damages it sustained by reason of the fire."

Now this instruction as given by the court omits an important element. That is, it was the duty of the Government, through its properly constituted officers, to exercise reasonable diligence to sell the burned timber and realize therefrom as much as possible to reduce the damage which may have been caused by the fire. The instruction as given by the court would be applicable to a state of facts where the Government exercised no diligence whatever in the matter. This instruction, therefore, was erroneous and those requested by the Railroad Company should have been given. Besides, it was misleading in submitting to the jury, the question whether there was a market. There was no dispute upon that subject, and could be none. The United States, in order to show any damage, had shown a market value.

V.

WHERE TREES ARE DESTROYED BY THE NEGLIGENCE OF ANOTHER, THE OWNER MAY BRING AN ACTION EITHER FOR THE VALUE OF THE TREES SO DESTROYED OR FOR THE INJURY TO THE LAND. IF THE OWNER BRINGS THE FORMER ACTION, THE PROPER MEASURE OF DAMAGES IS THE MARKET VALUE OF THE TREES DESTROYED INDEPENDENT OF THE LAND. IF

HE BRINGS THE LATTER ACTION, THE MEASURE OF DAMAGES IS THE DIMINISHED MARKET VALUE OF THE LAND, RESULTING FROM SUCH DESTRUCTION OF THE TREES THEREON. WHERE TREES ARE INJURED BY A FIRE BY THE NEGLIGENCE OF ANOTHER, BUT NOT DESTROYED, THE OWNER MAY BRING AN ACTION FOR THE INJURY TO THE TREES OR FOR THE INJURY TO THE LAND. IN EITHER CASE THE MEASURE OF DAMAGES IS THE DIFFERENCE BETWEEN THE MARKET VALUE OF SUCH TREES OR LAND IMMEDIATELY BEFORE AND IMMEDIATELY AFTER THE FIRE.

This is an action for the value of trees "*burned and destroyed*" by the alleged negligence of the company. The measure of damages, therefore, under the issues as made by the pleadings, would be the market value of the trees destroyed independent of the land. The court, therefore, should have given the instructions requested by the defendant as set forth in Assignment of Errors XXXVII, XXXVIII, Transcript of Record, pp. 396 and 397. Instead of giving these instructions, the court instructed the jury on this subject as follows:

> "In arriving at the damage, if any, sustained by the plaintiff, it will be your duty to take into consideration the market value of

> the timber, both burned *and unburned*, immediately before and immediately after the fire, and the difference between such market values, if any, will be the damage sustained by the plaintiff *to this land and the timber thereon.*"
> (Transcript of Record, pp. 344-345.)

As heretofore stated, this is an action for damages for the value of timber alleged to have been "*burned and destroyed*" by the negligence of the railroad company. It is not an action for damages for an injury to the land of the Government. Therefore, this instruction that it was the duty of the jury "to take into consideration the market value of the timber, both *burned and unburned*, upon the land immediately before and immediately after the fire, and the difference between such market values, if any, will be the damage sustained by the plaintiff *to this land* and the timber thereon," was erroneous. This instruction allowed the jury too much latitude. It allowed them to consider not only the injury to the timber but also the injury to the land. The Government does not claim anything in its complaint on account of injury to the land upon which this timber was burned but only claims the value of the timber "*burned and destroyed.*"

VI.

WHERE SEVERAL ACTS OF NEGLIGENCE ARE ALLEGED, PROOF OF ONE WILL SUPPORT A RECOVERY: BUT THE PROOFS MUST CONFORM TO THE NEGLIGENCE ALLEGED.

This is a rule of pleading and evidence that is elementary. This proposition of law is applicable to Assignment of Errors XL, Transcript of Record, p. 398, wherein the railroad company requested the court to instruct the jury that,

> "The burden of proof rests upon the plaintiff to show that the fire started on the right of way, for unless that fact be established, the alleged negligence of the railroad company in suffering the combustible material to get on its right of way was not the efficient and proximate cause of the accident, and upon that allegation of negligence the plaintiff would fail."

The railroad company was clearly entitled to this instruction. One of the grounds of negligence, alleged in the amended complaint was "that the railroad company negligently permitted combustible material to accumulate on its right of way and that sparks from the engines of the railroad company started a fire in *this* combustible material and it spread *from said right of way* to and upon the tracts of timber land owned by the United States and burned and destroyed the timber belonging to the Government." Manifestly, if the fire started *off the right of way* of the railroad company, then

the company would not be responsible, even though it was negligent in allowing combustible material to accumulate *on its right of way*, and this allegation of negligence would fail. The refusal of the court to give this instruction, or any instruction on this subject, allowed the jury to find a verdict for the plaintiff, even though the fire started in combustible material *off the right of way* of the railroad company.

We submit that by reason of the foregoing errors, the judgment of the lower court should be reversed and a new trial granted in this case.

Respectfully submitted,

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